JD(SF)-34-06
Santa Barbara, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO, CALIFORNIA

DONOVAN ELECTRIC, INC.

and Case 31–CA–27478

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION 413

*Michelle Youtz Scannell, Esq*., for the General Counsel.
*Lawrence H. Golkin, Esq*. (*Lawrence H. Golkin & Associates*), of Ventura, CA, for the Respondent.
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# DECISION

## Statement of the Case

**JOSEPH GONTRAM, Administrative Law Judge**. This case was tried in Los Angeles, California, on March 20 and 21, 2006. The International Brotherhood of Electrical Workers, Local Union 413 (the Union or Charging Party) filed the charge on August 23, 2005, and the complaint was issued October 31.[1] The complaint alleges that Donovan Electric, Inc. (the Respondent) failed to provide information to the Union which was necessary and relevant to the Union's performance of its duties, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) and discharged its entire contingent of nine union employees because of the employees' union or concerted activities, in violation of Section 8(a)(3) and (1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

## Findings of Fact

### I. Jurisdiction

Donovan Electric, Inc. is a corporation with a place of business in Santa Barbara, California, where it engages in business as an electrical contractor. The Respondent annually derives gross revenues in excess of $500,000. During the past 12 months, the Respondent purchased and received goods or services at its Santa Barbara facility valued in excess of $50,000 from enterprises located within the State of California. These enterprises, in turn,

[1] All dates are in 2005 unless otherwise indicated.

received these goods directly from points outside the State of California. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. Alleged Unfair Labor Practices

The facts in this case are not materially disputed. The Union has represented the Respondent's employees since at least 1988, and the Respondent has a long history of cooperative relations with the Union and its members. At all times since December 1, 1988, the Union has been the exclusive representative of the bargaining unit pursuant to Section 9(a) of the Act. The following employees of the Respondent constitute a unit (the Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees performing electrical construction work employed by Donovan Electric Inc. within the jurisdiction of the Union on all present and future projects.

The National Electrical Contractors Association (NECA) is an organization composed of employers engaged in the construction industry. NECA represents its employer members in negotiating and administering collective-bargaining agreements. The Respondent was a member of NECA and designated NECA as its collective-bargaining representative. On December 1, 1988, the Respondent and the Union entered into an agreement for voluntary recognition based on majority support of unit employees for the Union. Thereafter, the Respondent and/or NECA and the Union entered into successive collective-bargaining agreements. On June 1, 2003, the Respondent, through NECA, and the Union entered into a collective-bargaining agreement effective June 1, 2003 through May 31, 2005 covering employees in the Unit. The agreement provided, among other things, that the Union was the exclusive source of referral of applicants for employment. In accordance with this provision, the Respondent hired many of the union electricians involved in this case from the union hiring hall.

The agreement also provides that its provisions shall remain in effect until the parties enter into a new agreement or an agreement is imposed by the interest tribunal designated in the agreement, the Council on Industrial Relations for the Electrical Contracting Industry (CIR). (GC Exh. 5, section 1.02.) On August 15, 2005, the CIR directed the Union and the Respondent to sign a successor agreement.

In approximately 2004 or early 2005, the Respondent's financial affairs began to gradually deteriorate. This was due, at least in part, to sizeable, delinquent accounts receivables. The Respondent's vice president, Steven Donovan, blames his company's worsening financial condition on labor costs, in particular, the high cost of union labor. In 2004, Donovan was increasingly outbid by nonunion companies on construction projects, except for larger projects that stipulated the payment of prevailing wages. Accordingly, on December 30, 2004, Donovan sent a letter to Chuck Huddleston, the business manager of the Union, in which he wrote:

> I wish to inform you at this time that Donovan Electric will be withdrawing representation on any agreement with the International Brotherhood of Electrical Works [sic] Local 413.

> With the different business tactics the General Contractors and Project Owners are conducting in the business world today, it is not feasible to continue to recognize the various agreements with the Local. Getting paid by the General Contractors is being drawn out over a longer period of time, which makes it harder to pay the Local benefits, and we are heavily penalized with liquidation damages.
>
> At this time please accept this letter as a formal withdraw of a future agreement as of May 31, 2005 when the current agreement expires.

This letter confirms that the Respondent's financial problems were due, at least in part, to increased accounts receivables, yet the letter is silent about labor costs. Nevertheless, at the time he sent this letter to the Union, Donovan decided that he would not sign any more collective-bargaining agreements with the Union. (Tr. 395.)[2] He felt that his relationship with the Union would end with the expiration of the agreement.

In late 2004 and into the spring of 2005, the Respondent failed to make benefit payments to the Union as required by the Agreement. On April 8, the Union sent letters to its Unit members advising them of these delinquencies and of the Union's efforts to collect, including a recent lawsuit filed by the Union against the Respondent. Several days later, Donovan held a meeting with the employees in the yard at the Respondent's facility. Donovan explained that the company was experiencing financial problems, and he was hoping to resolve those problems. He was upset that the Union had filed a lawsuit. He explained that the Union was pressuring him to pay his debt and that he was trying to settle the matter. He assured the employees that he would try to remain a Union employer. On April 15, the Respondent filed a Chapter 11 bankruptcy petition.

In the days leading up to May 27, Donovan told two employees, Shane Campbell and Brian Eberhard, that the company might be going nonunion. Campbell and Eberhard asked Donovan if they could work for him when the company went nonunion, and he replied, yes. On Friday, May 27, at the end of the workday, Donovan laid off the Respondent's entire union workforce of nine electricians. He separately told each employee of his layoff when he returned to the shop at the end of their workday to collect his pay. The Respondent had never before laid off its entire workforce of electricians.

The union electricians that the Respondent laid off on May 27 are: Shane Campbell, Brian Eberhard, Daniel Santillano, Stephen Davis, Frank Gonzales, Steven Harris, Ronald Bellman, David Beyea, and Dennis Stamper. Donovan told Ronald Bellman, an electrician who had worked for Donovan for over 20 years, that he had decided to go nonunion. Donovan told Bellman that if Bellman retired from the Union, he could come back to work for the Respondent. Donovan told Bellman that because the agreement was due to expire on Tuesday, May 31, and since Monday was a holiday, he saw no reason to bring the employees back for one day following the Memorial Day weekend. Donovan told Steven Harris, an electrician who had worked for the Respondent since 1988, that the "union did not give us any choice and we have to lay everybody off." (Tr. 68.) Donovan told Harris to come back to the Respondent "if the union thing did not work out." (Tr. 69.) Daniel Santillano asked Donovan if he was going

[2] References to the transcript of the hearing are designated as Tr.

nonunion, and Donovan replied, yes. Donovan told Stephen Davis "the union is killing us and we are going nonunion." Davis replied, "[I]f you ever change your mind, I would be glad to work for you." (Tr. 215.)[3]

The Respondent argues that Santillano is not credible because Santillano stated on his application for unemployment benefits that the reason for his layoff was that the Respondent had filed for bankruptcy. Such a statement by Santillano does not impeach him or his testimony. Santillano may have believed that the layoffs initially arose from the Respondent's precarious financial position, but such a belief has no effect on the credibility of Santillano's testimony that Donovan said he was going nonunion. Moreover, and as noted above in this regard, Donovan's statement to Santillano was similar to and consistent with Donovan's statements to Bellman and Davis.

On May 27, the Respondent's nine union electricians were all working full time, 40 hours a week. Indeed, the week before the layoffs, Gonzales asked for a day off, but his request was denied because the Respondent was too busy. Gonzales and Santillano handled service calls, and the remaining electricians worked on larger projects. Although none of the jobs and projects that the union electricians were working on May 27 was completed, the Respondent had already contacted other sources to obtain nonunion electricians to assist in completing those jobs and projects.

Donovan rehired Campbell and Eberhard as nonunion electricians on June 1, the day after the agreement expired. When they began working, Donovan told them that the Respondent was a nonunion shop. When Campbell returned to his job on June 1, he had to make the choice between his union membership and his job with the Respondent. He elected to keep his job because he could not afford to be out of work. After being rehired on June 1, Campbell stopped paying union dues. Eberhard stopped paying union dues in November. On June 1, Campbell returned to the same job he was working on May 27, the Santa Barbara high school job, and Eberhard also returned to the same job he had been working, the Chapala Street project. Campbell and Eberhard were rehired at the same wage that they had earned as union electricians, but without the same benefits. As noted above, the Respondent had many other ongoing and uncompleted jobs on May 27.

After May 31, the Respondent no longer hired electricians from the Union hiring hall. Starting June 1, the Respondent began hiring electricians from the Contractors' Labor Pool (CLP), ProTrade, and Phillips Electric Company, temporary labor agencies uninvolved with a union. In the last 7 months of 2005, the Respondent paid CLP over $85,000, Phillips Electric over $5,000, and ProTrade over $27,000 for electrician employees supplied by those companies. From May 31 to the present, the Respondent has continued to operate as an electrical contractor. The major difference after May 31 is that the Respondent refused to have any dealings with the Union, and the Respondent was now a nonunion shop.

[3] The Respondent argues that Davis is not a credible witness because he allegedly filed a false worker's compensation claim after he was laid off. This argument is rejected. Donovan's purported statements to Davis are consistent with Donovan's statements to the other electricians. Moreover, the evidence does not support the contention that Davis filed a false worker's compensation claim. Davis forestalled filing the claim because of the Respondent's poor financial condition. Davis's claim was not false, and, if anything, it demonstrates his generosity toward and his concern for his employer.

Chuck Huddleston, the business manager of the Union, learned of the layoffs on May 27. He immediately faxed a grievance, dated May 27, to the Respondent. The grievance begins:

> It is my duty to inform you that I'm filing a grievance with Donovan Electric for violating the current collective bargaining Agreement, including but not limited to Article II, Section 2.05. The termination of workers is a violation of the Agreement and I ask that all workers be reinstated with full back pay and benefits.

(GC Exh. 17.) In the second week in June, Huddleston met with Donovan and the Respondent's attorney concerning the grievance. Huddeleston said that he wanted to get all the laid-off employees back to work, but Donovan said he only had enough work for four additional electricians. However, the Respondent did not offer to hire any union electricians. On approximately June 20, Huddleston again talked with the Respondent's attorney about getting the union electricians back to work, and the attorney said he would be meeting with Donovan on June 23 to discuss the matter. However, neither the attorney nor Donovan contacted Huddleston after June 23 about Huddleston's request to reinstate the laid-off electricians.

On June 28, Huddleston sent the Respondent a letter requesting certain information relating to the grievance. The requested information was as follows:

1. The name and classification of any employee hired by Donovan Electric after May 1, 2005 to perform electrical work.
2. The name and classification of any employee hired through a temporary labor agency after May 1, 2005 to perform electrical work and the name of the Donovan Electric project on which the contract worker was utilized as well as the number of hours utilized.
3. The name and contractor's license number of any contractor to which Donovan Electric subcontracted electrical construction work on and after May 1, 2005.
4. The name of all electricians terminated by Donovan Electric for any reason since May 1, 2005 and the basis for the termination.
5. With respect to all workers identified in response to Request Nos. 1 and 2 above, provide the following additional information
    a. Number of hours utilized
    b. The hourly rate of pay and fringe benefits for each worker
    c. The jobs on which each worker was utilized by Donovan Electric
6. With respect to all jobs identified as having been subcontracted in response to Request No. 3 above, provide the following additional information:
    a. Total dollar value of the subcontract
    b. Total amount of electrician manhours estimated for the subcontract work by either Donovan Electric or the subcontractor

c. Total electrician manhours actually worked on each job

By letter dated June 30, the Respondent, through its attorney, refused to produce any of the requested information. The reasons for this refusal were: (1) the contract has been terminated; (2) the requested information, in general and without specification, could not be provided without signed waivers from all of the persons whose employment information was requested; and (3) information on the contracts that the Respondent entered into since May 1, 2005 was not relevant.

## III. Analysis

In approximately December 2004, the Respondent concluded that it would be better able to compete for jobs and projects if it were a nonunion company. Simultaneously, the Respondent's increasing, and perhaps uncollectible, accounts receivable account led to financial problems resulting in bankruptcy. Rather than deal with the accounts receivable issue, or perhaps both issues at the same time, the Respondent decided to deal only with the union issue. With the collective-bargaining agreement due to expire on May 31, 2005, the Respondent, on December 30, 2004, notified the Union in a letter that it was withdrawing from the employers' association that had negotiated the agreement.

By his letter of December 30, Donovan intended to sever all ties with the Union at the end of the agreement. As he explained, the reason he decided to end his relationship with the Union was "because of high union labor costs." (Tr. 396.) He felt that after May 31, he would have no further need or obligation to deal with the Union. The Respondent's posthearing brief explains the legal basis for Donovan's decision (R Br., p. 14.):

> [A]t no time after the expiration of the contract would the union have enjoyed a presumption of majority status. In that regard, without violating the Act, Steve Donovan was free to tell employees that, after May 31, 2005, the shop would be nonunion and even that wages would not be lowered if the employees went nonunion. *Yellowstone Plumbing*, 286 NLRB 993, 1002 (1987).

*Yellowstone Plumbing* does not apply to this case. In *Yellowstone Plumbing*, the employer withdrew recognition from, and refused to bargain with, the union after the expiration of the agreement. The Board held that these actions did not constitute unfair labor practices because the relationship between the union and the employer arose under Section 8(f) of the Act. Under Section 8(f), the union does not enjoy a presumption of majority status, and its status as the employees' representative is subject to challenge at any time. Id. at 993.

In the present case, the Respondent's relationship with the Union arises under Section 9(a) of the Act. The Union enjoyed an irrebuttable presumption of majority status during the contract's term, and a rebuttable presumption of majority status after the expiration of the contract. *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786 (1996). The Respondent presented no evidence to rebut that presumption. Accordingly, the Respondent was obligated to bargain with the Union after May 31, and Donovan could not unilaterally decide that he would have no further dealings with the Union after the contract expired. Nor could Donovan tell his employees that the shop would be nonunion or that wages would not be lowered if the employees went nonunion. Furthermore, it is possible, if not likely, that the contract did not expire on May 31, and that its provisions continued in force until the CIR issued its decision on August 15.

Moreover, and whether or not Section 8(f) or 9(a) applies, the Respondent is prohibited from discriminating against union workers without regard to the existence or nonexistence of a contract.

*A. Section 8(a)(3) and (1) – Discharge of nine electricians*

Section 8(a)(3) of the Act prohibits an employer "by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization." Where the evidence may support a lawful and/or an unlawful motivation, *Wright Line* guides the analysis into the employer's motivation. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel has the burden of proving by a preponderance of the evidence that the employee's union or other protected concerted activity was a substantial or motivating factor in the employer's discharge of an employee. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). To meet this burden, the General Counsel must establish four elements. First, the existence of activity protected by the Act. Second, that the Respondent was aware of such activity. Third, that the alleged discriminatees suffered an adverse employment action. Fourth, a motivational link, or nexus, between the employees' protected activity and the adverse employment action. *American Gardens Management Co*., 338 NLRB No. 76 (2002).

If the General Counsel satisfies his initial burden under *Wright Line*, the burden then shifts to the employer, in the nature of an affirmative defense, to demonstrate that the same action would have taken place even in the absence of the protected conduct. In meeting this burden, the employer cannot simply state a legitimate reason for the action taken, but rather must persuade by a preponderance of the evidence that it would have taken the same action in the absence of the protected activity. *T & J Trucking Co*., 316 NLRB 771 (1995).

The Union argues that Donovan's unambiguously expressed intention to be nonunion after May 31 and to have no further dealings with the Union, coupled with his layoff of the Respondent's entire contingent of union workers on May 31 and his subsequent hiring of nonunion electricians from nonunion sources, is conduct that is inherently destructive of Section 7 rights. The Union argues that independent proof of motivation is not necessary for such conduct in which the requisite unlawful intent "is founded upon the inherently discriminatory or destructive nature of the conduct itself." *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 228 (1963); *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33–34 (1967). Indeed, mass discharges of union adherents, alone, are particularly destructive of Section 7 rights. *Catalytic Industrial Maintenance Co*., 301 NLRB 342 (1991).

Despite the Union's "inherently destructive" argument, the General Counsel's theory in this case is that the Respondent's layoffs were motivated by the electricians' union status, and that the Respondent's motivation should be analyzed under *Wright Line*. The General Counsel does not contend that the layoffs were inherently destructive of Section 7 rights. Rather, the General Counsel contends that the Respondent's motivation makes the layoffs illegal, and such motivation is apparent in the Respondent's action of laying off union workers and rehiring nonunion workers, as well as Donovan's statements. In the end, the difference between the two approaches may not be as great as the principle invoked when the Charging Party seeks to expand or change the General Counsel's theory of the case. "[I]t is well established that the General Counsel's theory of the case is controlling, and that a charging party cannot enlarge upon or change the General Counsel's theory." *Zurn/N.E.P.C.O*., 329 NLRB 484, 484 (1999), citing *Kimtruss Corp*., 305 NLRB 710 (1991). Accordingly, whether the layoffs were "inherently destructive" of Section 7 rights under *Great Dane Trailers* cannot be considered.

The laid off workers were engaged in activity protected by the Act because they were members of the Union. The Respondent knew they were members of the Union, and the Respondent does not contend otherwise. The workers were laid off. The motivational link between the workers' union status and their being laid off is the direct evidence from Donovan's statements, for example, that the Respondent was going nonunion.

The Respondent determined as early as December 2004 that it would no longer be a union company after the end of the current contract. Donovan believed, rightly or wrongly, that the Respondent could not effectively compete with other companies as long as it was required to pay union wages. And so, rather than trying to negotiate a lower wage rate with the Union, or advising the Union of his financial predicament and trying to negotiate some other concessions that might enable the Respondent to more effectively compete, or taking any number of other actions, Donovan unilaterally decided that the Respondent would simply not deal with the Union after the end of the agreement. Of course, the Union still represented all of the Respondent's electricians before, during, and after the term of the agreement, but Donovan remedied this by terminating all of those electricians on May 27. And, adding insult to injury, the Respondent hired two of the laid off, union electricians a day later as nonunion electricians.

The Respondent's antiunion animus in discharging its union electricians is also demonstrated by its immediate rehiring of two electricians it had just laid off. If the Respondent were not motivated to eliminate its union workers, there would have been no need to discharge Campbell and Eberhard before rehiring them. However, in an effort to leave no doubt that it was a nonunion company, the Respondent decided to eliminate its entire union workforce before hiring the two "former" union electricians as nonunion electricians.

The Respondent argues that no witness testified about being interfered with, restrained from, or coerced in connection with the exercise of any rights guaranteed in Section 7. Even if that were accurate, it is not relevant. The complaint does not charge an independent violation of Section 8(a)(1). Rather, the complaint charges a violation of Section 8(a)(3), which prohibits encouraging or discouraging union membership through employment discrimination. Section 8(a)(3) is violated when an employer, with the stated intention of changing his company from a union employer to a nonunion employer, discharges all his union employees and hires nonunion employees to do the same work. In these circumstances, the Respondent selected its union employees for discharge (discrimination) in order to transform the company into a nonunion employer (motivation), actions that reasonably and naturally, if not compellingly, discourage union membership.

The Respondent also argues that there is no evidence that Donovan was motivated by antiunion animus. However, the Respondent either ignores or fails to account for Donovan's statements that he intended to make his union company a nonunion company, and Donovan's subsequent actions in carrying out that intention. Such statements and actions demonstrate antiunion animus. Alternatively, the Respondent argues that there is no direct evidence of antiunion animus. However, even if this were accurate, the short answer is that direct evidence of antiunion animus is not required.

The Respondent argues that various factors from which unlawful motivation may be inferred (such as disparate treatment, suspicious timing, other unfair labor practices, etc.) are not present in this case. However, in the present case there is no need to resort to such indirect factors in attempting to divine the Respondent's motivation. Donovan's statements that he was changing his company to a nonunion company support the determination that antiunion animus motivated the discharges of the union electricians.

As noted above, the Respondent argues that "statements regarding whether or not the company was going nonunion at the end of the contract, made on May 27 . . . do not violate the Act because at no time after the expiration of the contract would the union have enjoyed a presumption of majority status." (R Br., p. 14.) However, and without regard to the "presumption of majority status" reference, the Respondent is not charged with making unlawful threats in violation of Section 8(a)(1). The Respondent is charged with unlawfully discharging its union employees in violation of Section 8(a)(3), and Donovan's statements, even if not unlawful themselves, are evidence of his intention in carrying out his plan to make his company nonunion.

The Respondent argues that its decision to terminate union workers and hire nonunion workers was based on its poor financial condition, and that the terminated electricians' union membership was simply a circumstance, not a reason. This argument fails to address the Respondent's clearly expressed intention to "go nonunion" at the expiration of the agreement, as well as the Respondent's execution of that intention by terminating every union employee while hiring only nonunion employees, including two of the same employees the Respondent had terminated one day earlier. Moreover, the Respondent's motivation in discharging the electricians assimilated its economic reason (whether or not it was misguided) into its antiunion motivation. Donovan unilaterally decided that his union employees were too expensive, and he carried out his decision by discharging all his union employees and offering employment only to electricians who would work without a union, such as Campbell and Eberhard.

The Respondent's union-centered motivation distinguishes this case from other cases in which an employer's economic defense prevailed over a charge of discriminatory discharge. For example, in *Ryder Distribution Resources*, 311 NLRB 814, 316–317 (1993), the Board, in deciding that the employer satisfied its *Wright Line* burden of demonstrating it would have taken the same action even in the absence of the employees' protected activity, stated that it "considers the factors known to the employer at the time the decision was made and decides whether the employer's business strategy was chosen for discriminatory reasons." In the present case, the Respondent's business strategy of changing from a union company to a nonunion company was chosen for a discriminatory reason.

In *Gem Urethane Corp*., 284 NLRB 1349, 1351 (1987), the Board discounted certain indirect evidence of unlawful motivation, stating that "Although these are factors properly to be considered in determining whether the layoff was unlawful, they are, in the case at bar, outweighed by the Respondent's economic defense." In the present case, the direct evidence of unlawful motivation is part and parcel of the decision to discharge the union employees. The union electricians were discharged for the very reason that they were members of the union. This singular motive is convincingly demonstrated by the rehiring of two of the discharged union employees as nonunion employees one day after they were discharged. Accordingly, the unlawful motivation in the present case, so starkly demonstrated, is not outweighed by the Respondent's economic defense.

The Respondent's economic defense also fails because the Respondent has not shown by a preponderance of the evidence that it would have taken the same action in the absence of the protected status of the discharged employees. *T & J Trucking Co*., 316 NLRB 771 (1995). Merely demonstrating that its decision made good economic and business sense is insufficient. E.g., *Pace Industries*, 320 NLRB 661, 662, 709 (1996), enfd. 118 F.3d 585 (8th Cir. 1997), cert. denied 525 U.S. 1020 (1998). The evidence shows that the Respondent made the discharges

because of the protected status of the employees. Accordingly, the Respondent would not have made the same decision to discharge its electrician employees if they were not members of the Union.

Accordingly, the Respondent's economic defense is rejected. The terminated electricians' union membership was more than a circumstance; it was the reason they were terminated; it was the condition for their termination. The Respondent wanted to be a nonunion company, a desire likely emanating from economic considerations, but its method of accomplishing this was to discriminate against the union employees by discharging them and hiring nonunion workers to replace them.

The Respondent asserts that after the agreement expired it could hire and fire employees based on their union status. This contention is without merit. Unlawful discrimination under Section 8(a)(3) does not require or presuppose the existence of a collective-bargaining agreement. Indeed, Section 8(a)(3) is frequently violated during the ebb and flow of employee organization and without the existence of a collective-bargaining agreement. The Act does not permit discriminatory employment actions before and after the effective dates of an agreement while proscribing such discrimination only during the existence of a contract. Moreover, the periods before and after a contract are among the times when the statute may be most needed and useful.

The Respondent also argues that the evidence does not establish that the Respondent terminated its union employees for the purpose of discouraging membership in the union. However, the evidence shows that the Respondent terminated its entire workforce of union electricians in order to become a nonunion company. The Act does not require that the purpose of discouraging membership in the union to be established by direct evidence. The Board is entitled to make reasonable inferences from the facts. *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954). "[I]t is common experience that the desire of employees to unionize is raised or lowered by the advantages thought to be attained by such action." Id. at 51. In the present case, the inference is compelling that the desire of employees to unionize would be lowered by the Respondent's action in terminating all its union employees and hiring nonunion employees to replace them. Accordingly, the evidence establishes that the Respondent's discriminatory discharge of its electrician employees was for the purpose of discouraging membership in the union.

For the foregoing reasons, the Respondent violated Section 8(a)(3) and (1) in discharging its nine union electricians on May 27.

*B. Section 8(a)(5) and (1) – Failure to provide requested information*

"There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967). These duties encompass the union's responsibilities as bargaining representative for employees under the Act. A failure to provide relevant information violates Section 8(a)(5) and (1) of the Act. *NLRB v. Acme Industrial Co*.; *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1970). The employer's obligation also extends to information in furtherance of, or which would allow the union to decide whether to process, a grievance. *NLRB v. Acme Industrial Co*., 385 U.S. at 436; *Bickerstaff Clay Products*, 266 NLRB 983 (1983).

The standard for relevancy is a liberal, "discovery-type standard." *NLRB v. Acme Industrial Co*, 385 U.S. at 437. Accordingly, information that is "potentially relevant and will be of use to the union in fulfilling its responsibilities as the employees' exclusive bargaining representative" must be produced. *Pennsylvania Power and Light Co*., 301 NLRB 1104, 1104–1105 (1991). The requested information need not be dispositive of the issue for which it is sought, but need only have some bearing on it. Id. at 1105. "An employer must furnish information that is of even probable or potential relevance to the union's duties." *Conrock Co*., 263 NLRB 1293, 1294 (1982).

After the expiration of a collective-bargaining agreement, an employer is obligated to process grievances that accrue during the agreement's term. *Nolde Brothers, Inc. v. Bakery Workers*, 430 U.S. 243 (1977); *Steiner Trucraft*, 237 NLRB 1079 (1978). In the present case, the grievance, which was the subject of the Union's information request, accrued during the term of the collective-bargaining agreement.

Information pertaining to employees within the bargaining unit is presumptively relevant. *Postal Service*, 332 NLRB 635 (2000). On the other hand, the union must show the relevance of information that does not concern employees in the bargaining unit. In keeping with the liberal standard of relevance, this burden is not a heavy one and only requires the union to demonstrate more than a mere suspicion of the matter for which the information is sought. *Sheraton Hartford Hotel*, 289 NLRB 463 (1988). In the present case, the requested information is not presumptively relevant because the information concerns the subcontracting of members' responsibilities and the employment of nonunion electricians to perform duties previously performed by union members.

The Respondent does not question the relevancy of the information requested by the Union in its letter of June 28. However, because the union has the burden of establishing relevance, it is appropriate to inquire whether this burden has been met. On May 27, the Union filed a grievance on the Respondent's discharge of its entire workforce of union electricians. The persons hired to replace these discharged electricians, and the jobs that were subcontracted involving the work previously performed by the discharged electricians, are relevant to the grievance. Accordingly, the Union has satisfied its burden of proof that the requested information is relevant.

The Respondent asserts two defenses to the present charge. First, the Respondent claims that no grievance was filed by the Union, citing certain testimony by Huddleston. However, in considering all of Huddleston's testimony, it is apparent that he believed and intended his May 27 letter to be a grievance. Moreover, Huddleston's May 27 grievance letter supports this conclusion.

Second, the Respondent asserts that its June 30 letter, in which it refused to produce any of the information requested by the Union, invited the Union to contact the Respondent if the Union had any questions. Because the Union did not thereafter contact the Respondent with any questions, the Respondent claims that the charge is moot. This defense is frivolous at best. The Union could hardly be expected to have any questions after the Respondent flatly refused to produce any of the requested information. The Respondent does not claim that it is or was willing to produce any of the information the Union had requested. The Respondent has refused to produce the requested information, and the only question remaining is whether that refusal is lawful. As explained above, the requested information is relevant to the Union's grievance, and the Respondent's refusal to produce the requested information is a violation of Section 8(a)(5) and (1) of the Act and is unlawful.

## Conclusions of Law

1. Respondent, Donovan Electric, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Brotherhood of Electrical Workers, Local Union 413, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive representative of the following employees of the Respondent, which constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees performing electrical construction work employed by Donovan Electric Inc. within the jurisdiction of the Union on all present and future projects.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully discharging Shane Campbell, Brian Eberhard, Daniel Santillano, Stephen Davis, Frank Gonzales, Steven Harris, Ronald Bellman, David Beyea, and Dennis Stamper.

5. The Respondent violated Section 8(a)(5) and (1) of the Act because the Respondent failed and refused to bargain in good faith with the Union as the exclusive bargaining representative of the employees in the above appropriate unit by refusing to provide information to the Union that the Union had requested on June 28, 2005.

6. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

## Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Shane Campbell, Brian Eberhard, Daniel Santillano, Stephen Davis, Frank Gonzales, Steven Harris, Ronald Bellman, David Beyea, and Dennis Stamper, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## ORDER

The Respondent, Donovan Electric, Inc., Santa Barbara, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Union as the exclusive bargaining representative of its electrician employees in the appropriate bargaining unit described above by failing and refusing to furnish the Union with the information requested in the Union's letter of June 28, 2005.

(b) Discharging or otherwise discriminating against any employee on the basis of the employee's union affiliation or other protected activities.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide and give to the Union all of the information requested in the Union's June 28 letter to the Respondent.

(b) Within 14 days from the date of the Board's Order, offer Shane Campbell, Brian Eberhard, Daniel Santillano, Stephen Davis, Frank Gonzales, Steven Harris, Ronald Bellman, David Beyea, and Dennis Stamper full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Shane Campbell, Brian Eberhard, Daniel Santillano, Stephen Davis, Frank Gonzales, Steven Harris, Ronald Bellman, David Beyea, and Dennis Stamper whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify Shane Campbell, Brian Eberhard, Daniel Santillano, Stephen Davis, Frank Gonzales, Steven Harris, Ronald Bellman, David Beyea, and Dennis Stamper in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Santa Barbara, California, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 27, 2005.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., June 29, 2006.

Joseph Gontram
Administrative Law Judge

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain collectively and in good faith with the International Brotherhood of Electrical Workers, Local Union 413 (the Union) by refusing to give the Union information that it needs to represent you.

WE WILL NOT discharge or otherwise discriminate against any employee on the basis of the employee's union affiliation or other protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL provide the Union with the information it requested on June 28, 2005 regarding employees hired and terminated, and subcontracts made, after May 1, 2005.

WE WILL, within 14 days from the date of the Board's Order, offer Shane Campbell, Brian Eberhard, Daniel Santillano, Stephen Davis, Frank Gonzales, Steven Harris, Ronald Bellman, David Beyea, and Dennis Stamper full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Shane Campbell, Brian Eberhard, Daniel Santillano, Stephen Davis, Frank Gonzales, Steven Harris, Ronald Bellman, David Beyea, and Dennis Stamper whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Shane Campbell, Brian Eberhard, Daniel Santillano, Stephen Davis, Frank Gonzales, Steven Harris, Ronald Bellman, David Beyea, and Dennis Stamper, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

DONOVAN ELECTRIC, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 West Olympic Boulevard, Suite 700
Los Angeles, California 90064-1824
Hours: 8:30 a.m. to 5 p.m.
310-235-7352

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 310-235-7123.

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